

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Advanced Television Systems and )  
Their Impact Upon the Existing )  
Television Broadcast Service )

MM Docket No. 87-268

To: The Commission

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COMMENTS OF KM COMMUNICATIONS, INC.

KM Communications, Inc. ("KM"), by its counsel, and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits these comments in response to the Sixth Further Notice of Proposed Rulemaking<sup>1</sup> in the above captioned proceeding.

**I. Introduction.**

KM, a minority-owned Illinois corporation,<sup>2</sup> currently: (i) is the licensee of four existing Low Power Television ("LPTV") stations;<sup>3</sup> (ii) is the permittee for a new full service commercial television station, and its principal holds a 50% equity interest in the permittee for another new full service commercial television station;<sup>4</sup> (iii) has applications pending for three

<sup>1</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, Sixth Further Notice of Proposed Rulemaking, 11 FCC Rcd 10968 (1996) ("Sixth FNPRM").

<sup>2</sup> Myoung Hwa Bae, a woman and a minority under the Commission's Rules by virtue of her Asian heritage, is the President, sole Director and 100% shareholder of KM.

<sup>3</sup> WOCH-LP and WOCK-LP, Chicago, Illinois; WSKC-LP, Atlanta, Georgia; and WMKE-LP, Milwaukee, Wisconsin.

<sup>4</sup> KM is the permittee (File No. BPCT-941215KF) for a new full service commercial television station, KWKB(TV), on Channel 20 at Iowa City, Iowa. KM's principal, Mrs. Bae, holds 50% of the membership interests in OKC-30 Television, L.L.C. ("OKC-30"),

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full service commercial television stations for which universal settlement agreements have been on file with the Commission for over 11 months which, if approved, would result in the grant of KM's applications;<sup>5</sup> and (iv) has applications pending for additional full service commercial television stations.

Accordingly, KM has great interest that any digital television ("DTV") channel allotment plan fully accommodates the allocation of DTV channels for all existing full service television permittees, as well as for all full service television permittees that likely will exist as of the date of issuance of any DTV licenses, as clearly mandated by Congress in the Telecommunications Act of 1996.<sup>6</sup> The Commission must also ensure that any DTV channel allotment plan adopted does not conflict with any pending applications for vacant analog National Television System Committee ("NTSC") channel allotments. Finally, as an LPTV licensee, KM also urges the Commission to make every effort to minimize any disruption to existing LPTV operations when making DTV channel allotments. The protection of existing licensees and permittees, whether full service television stations or permits or LPTV licensees, and the services they provide, should take precedence over any channel allotment goal of "recovering" spectrum for other purposes.

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which is the permittee (File No. BPCT-950814KE) for a new full service commercial television station, KAQS(TV), on Channel 30 at Shawnee, Oklahoma, as the result of a settlement in which KM dismissed its application for Shawnee (File No. BPCT-950331KE).

<sup>5</sup> KM is a party to joint requests for approval of universal settlement agreements filed on December 7, 1995, for its application for Channel 58 at Sierra Vista, Arizona (File No. BPCT-941021KI) and on December 14, 1995, for its applications for Channel 14 at Boise, Idaho and Channel 9 at Flagstaff, Arizona (File Nos. BPCT-941215KF and BPCT-950317KN, respectively). The FCC notified KM verbally of a grant of the Sierra Vista application on November 1, 1996, but has not yet released a letter or Public Notice of such grant.

<sup>6</sup> Pub. L. No. 104-1-4, 110 Stat. 56 (1996)(the "1996 Act").

**II. DTV Channels Must Be Allotted For All Existing And Potential Full Service Television Permittees.**

The Commission's proposed definition of "existing eligible broadcasters" is inconsistent with the Congressional mandate in the 1996 Act to issue DTV licenses "to persons that, *as of the date of such issuance*, are licensed to operate a television broadcast station, *or hold a permit to construct such a station*."<sup>7</sup>

The Commission has proposed to limit its definition of "existing eligible broadcasters" to: (i) "all full-service television broadcast station licensees;" (ii) "permittees authorized as of October 24, 1991;" and (iii) "all parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded full-service broadcast station licenses." See Sixth FNPRM at ¶ 10. The Commission's proposed definition, while consistent with prior Commission proposals, is inconsistent with the subsequent Congressional requirement in that it excludes permittees (such as KM) that hold or will hold construction permits from applications filed and granted after October 24, 1991, but granted prior to the "issuance" of DTV licenses - the criteria established by Congress in the 1996 Act.

The construction permits currently held by KM and OKC-30 for new full service television stations, as well as the permits KM anticipates from its three applications for which approval of universal settlement agreements are pending,<sup>8</sup> fall squarely in this gap between the Commission's proposed criteria for a DTV channel and the Congressional mandate, and must

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<sup>7</sup> See 1996 Act at § 201, as codified at 47 U.S.C. § 336(a)(1) (emphasis added).

<sup>8</sup> KM is concerned that the Commission should not purposefully delay its consideration of the pending settlements until after issuance of DTV licenses. Such a delay on some but not all of the universal settlements that have been submitted to the Commission would be unjust and inappropriate.

be allotted a DTV channel.<sup>9</sup> Both permits were granted as a result of applications filed after October 24, 1991, and were granted as the result of the approval of universal settlements. Furthermore, compliance with the intent expressed by Congress, by the adoption of rules which would include the allotment of DTV channels for *all* permits existing as of the date of issuance of any DTV licenses, should not impose an undue hardship on the Commission or the DTV allotment process since very few permits would fall in that category.

The 1987 freeze on new applications for the top 30 television markets should effectively limit the need for additional DTV channels for such permits in the most congested markets, and the 1994 freeze<sup>10</sup> on comparative hearings, due to the Bechtel<sup>11</sup> decision, should severely restrict the number of permits that have been or will be granted between October 24, 1991 and the issuance of DTV licenses. Indeed, due to the comparative hearing freeze, the few construction permits that would be adversely affected by the Commission's proposed definition largely would be permits granted as the result of universal settlements -- which clearly would affect KM more than any other party.<sup>12</sup> In addition to violating Congressional intent, leaving a new market entrant such as KM (or any other similarly situated party) with only an analog

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<sup>9</sup> Attached hereto as Exhibit A is a letter from KM's consulting engineers, Cohen, Dippell & Everist, P.C., which sets forth the equivalent effective radiated power required for a DTV operation to replicate the NTSC operation authorized by the KM and OKC-30 permits or proposed in the three KM applications for which settlement agreements have been reached.

<sup>10</sup> See Public Notice, FCC 94-41 (released February 25, 1994).

<sup>11</sup> Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).

<sup>12</sup> Of the approximately 12 universal settlements that KM understands were filed during the 90 day settlement window in late 1995, see Public Notice, FCC 95-391 (released September 15, 1995), KM was a party to 10 of the settlements, under which (if approved) KM would receive four permits, a 50% interest in another permit, and would dismiss five of its pending applications.

NTSC channel while allotting a DTV channel to every other existing competitor in the market would be fundamentally unfair, and may hamper the ability of such parties to attract the advertising dollars and financial investments necessary to compete in the market. It would be inappropriate and ironic if the Commission would take an action which would adversely affect a minority-owned party such as KM so severely at the very time that a proceeding is pending to consider how to improve minority participation in broadcasting.<sup>13</sup>

Therefore, to implement the mandate of Congress properly, the Commission must adopt a definition of "eligible existing broadcasters" consistent with the 1996 Act, which includes *all* parties holding permits for full service television stations as of the date of the issuance of any DTV licenses, and the Commission must plan for DTV channels to accommodate such parties in developing any DTV channel allotment plan.

**III. Any DTV Channel Allotment Plan Must Not Conflict  
With Any Pending Full Service Television Applications.**

Any DTV channel allotment plan must also protect and prevent interference to any new NTSC stations which may be constructed under permits granted as a result of any pending NTSC applications that were properly and timely filed prior to the freeze imposed on new applications for vacant allotments and petitions for rulemaking.<sup>14</sup> The Commission also may not, as it suggests, simply deny (or "not grant") such applications, see Sixth FNPRM at ¶ 60, but rather must either: (i) grant such an application, if the Commission finds that the public interest,

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<sup>13</sup> See, e.g., Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket Nos. 94-149 and 91-140, Notice of Proposed Rulemaking, 10 FCC Rcd 2788 (1995).

<sup>14</sup> See Sixth FNPRM at ¶¶ 60-63. The Commission estimates that there are over 300 such applications for over 100 new NTSC stations currently on file.

convenience and necessity would be served thereby; or (ii) if "the Commission for any reason is unable to make [such a finding], it *shall* formally designate the application for hearing."<sup>15</sup>

Since each pending NTSC application must either be granted, if in the public interest, or designated for a formal hearing, any DTV channel allotment scheme must plan for the construction of such proposed NTSC stations. The Commission should provide for a DTV channel for such potential stations in any DTV channel allotment plan, in the event that any of the pending applications are granted prior to the issuance of any DTV licenses,<sup>16</sup> and to ensure that such new market entrants may remain viable in competition with other stations in the market which receive DTV channels. Even assuming, for the sake of argument, that none of the pending applications result in permits that are entitled (under the Congressional mandate) to a DTV channel, any NTSC stations which result from those existing applications should still be entitled to interference protection from any new DTV stations. The DTV allotment plan proposed in Appendix B to the Sixth FNPRM directly conflicts with the new NTSC stations proposed in several applications,<sup>17</sup> and therefore should be modified to remove any such conflicts.

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<sup>15</sup> See 47 U.S.C. § 309(a),(e) (emphasis added); see also, 47 C.F.R. § 73.3572(f).

<sup>16</sup> KM recognizes, however, that it is possible that no further pending applications may be granted (absent a universal settlement) due to the freeze on comparative hearings, since there apparently has been little progress toward the adoption of new comparative hearing criteria in the almost three years since the Bechtel decision.

<sup>17</sup> For example, KM's application for Channel 9 at Walla Walla, Washington (File No. BPCT-960930KY) directly conflicts with the proposed co-channel DTV allotment of Channel 9 to Richland, Washington, approximately 45 miles from Walla Walla, and KM's applications for Channel 20 at Salt Lake City, Utah, and Channel 24 at Minot, North Dakota (File Nos. BPCT-950109KE and BPCT-960930KU, respectively) conflict with proposed first adjacent channel DTV allotments in those communities.

**IV. Any Impact On Existing Service By  
LPTV Licensees Should be Minimized.**

KM has reviewed an advance draft of the comments of the Community Broadcasters Association ("CBA"), and expects to largely support the positions advanced by the CBA therein, so with regards to LPTV these comments are limited to particular points which KM wishes to emphasize. More specifically, KM expects to support the comments and proposals of the CBA regarding: (i) the channel allocation process, including private negotiations; (ii) changes to the Commission's technical rules for LPTV to make more efficient use of available spectrum, including modifying the interference standards; (iii) relief for LPTV stations displaced by DTV stations, particularly including the concept of a "penalty" for displacing LPTV in the channel allotment and allotment comparison process; and (iv) compensation for displaced LPTV stations.

KM is concerned, as apparently is the CBA, that the Commission may summarily destroy the existing viable LPTV industry, and lay waste to the investments made by individual LPTV licensees, on the justification that LPTV licenses have always been granted on a "secondary" basis. Over the approximately 15 year history of the LPTV service, the "secondary" status of LPTV has meant that an LPTV station would occasionally be displaced by a full service station, and the few displaced stations that could not find an alternate channel have been forced off the air. LPTV licensees, such as KM, have developed their enterprises and made investments based on this historical background, and could not have predicted the actions now proposed by the Commission that very likely would result in the wholesale displacement of LPTV stations, a great majority of which would be forced to go dark, with the resultant loss of investments and service to the public.

As just one example, WOCH-LP -- one of KM's LPTV stations serving much of

downtown Chicago -- would likely be displaced by the DTV allotment plan proposed by the Commission.<sup>18</sup> KM has invested or committed in excess of \$1 million to upgrade its Chicago LPTV operation, to allow KM to provide a new source of cultural and ethnic programming to a variety of minority populations in Chicago, much of which may be lost if its LPTV stations are displaced.

At a minimum, to the extent that any DTV allotment plan will involve some displacement of LPTV stations, KM supports the Commission's proposals to allow displaced LPTV stations to file applications for an alternate channel outside of any filing window, as soon as there is a "reasonable expectation of displacement." See Sixth FNPRM at ¶ 67. KM proposes that such a "reasonable expectation of displacement" should be defined as any point after the adoption of a DTV allotment plan that would displace an LPTV station. KM also supports allowing displaced LPTV stations to relocate to all existing channels, including Channels 52 to 50 and Channels 60 to 69, even if the Commission decides to try to concentrate all full service allotments within some "core" channels. Id. at ¶¶ 68 and 70. The Commission should also consider and adopt interference standards for LPTV that are based on interference, rather than simply a generic mileage separation, and allow consideration of other factors which affect interference, such as terrain shielding. Id. at ¶ 71.

Once a DTV allotment plan has been adopted and implemented, and every full service television licensee and permittee (regardless of the application filing date) existing as of the

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<sup>18</sup> WOCH-LP currently is on Channel 4 but is completing construction of an authorized modification which includes a change to Channel 28. The DTV allotment plan proposed as Appendix B to the Sixth FNPRM would likely displace WOCH-LP from either channel, with DTV allotments proposed for first-adjacent Channels 3, 27 and 29.



issuance of DTV licenses has received a DTV channel, the Commission should consider granting all existing LPTV stations a "primary" license for their channel, as either an NTSC or DTV facility. Id. at ¶ 72. The primary license should replicate the service area existing at that time for the LPTV licensee, and should be determined and awarded prior to any effort to recover the spectrum for other uses.

**V. General Comments On The Sixth FNPRM.**

The Commission's consideration of a DTV allotment plan should not "favor" DTV over NTSC or even be neutral, but rather should consider and adopt a DTV plan that minimizes disruption to existing or planned service and investment by any licensee or permittee, whether full service or LPTV, id. at ¶ 39, and with less of an emphasis on "recovering" spectrum for other uses. Id. at ¶¶ 25-27. Any potential economic gains that the Commission envisions from the auction of that spectrum should be tempered by the certain disruption which would be caused to existing viable operations, which provide vital service to the public. KM also supports the Commission's proposal to make DTV allotments on the basis of replicating existing authorized service areas and interference considerations, and not rely on minimum mileage separation or spacing standards. Id. at ¶ 82.

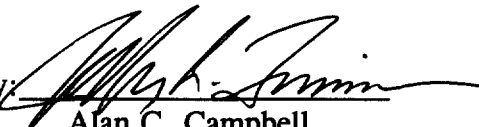
In considering how to treat "vacant" NTSC channel allotments, KM is concerned that the Commission has not defined what constitutes a "vacant" allotment; since the Commission has proposed to eliminate "vacant" allotments, that term should be defined as an allotment for which no permit has been issued and for which no applications are pending. Id. at ¶¶ 57-63.

**VI. Conclusion.**

Wherefore, the above-premises being considered, KM respectfully requests that the

Commission adopt DTV rules and an allotment plan that are not inconsistent with the comments raised herein. Specifically, should adopt a DTV allotment plan that fully provides for all permittees that may exist at the time of issuance of any DTV licenses, that would not conflict with any pending full service NTSC television applications, and that would eliminate to the greatest extent possible any disruption to any licenses or permittees (full service or LPTV) authorized as of the date of issuance of any DTV licenses.

Respectfully submitted,  
KM COMMUNICATIONS, INC.

By:   
Alan C. Campbell  
Jeffrey L. Timmons

Its Attorneys

IRWIN, CAMPBELL & TANNENWALD, P.C.  
1730 Rhode Island Avenue, N.W., Suite 200  
Washington, D.C. 20036-3101

(202) 728-0400

November 22, 1996

**EXHIBIT A**  
**TO**  
**COMMENTS OF KM COMMUNICATIONS, INC.**

**COHEN, DIPPELL AND EVERIST, P. C.**  
**CONSULTING ENGINEERS**

DONALD G. EVERIST  
SUDHIR K. KHANNA  
WARREN M. POW S  
JOHN R. URAM, J.R.  
ROBERT W. GUILLE  
WILSON A. LA FOLLETTE

**RADIO-TELEVISION**  
1300 L STREET, N. W.  
SUITE 1100  
WASHINGTON, D. C. 20005  
(202) 898-0111

JULIUS COHEN  
(1913-1993)  
RALPH E. DIPPELL, JR.  
(1922-1992)  
TELECOPIER  
(202) 898-0888

November 22, 1996

Mr. Jeff Timmons  
Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Avenue, NW  
Suite 200  
Washington, DC 20036

Dear Jeff:

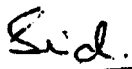
A review of the FCC Sixth Further Notice of Proposed Rule Making in MM Docket No. 87-268 indicates the FCC has not allotted any DTV channels to NTSC operation authorized and/or proposed. We believe KM Communications, Inc. should request the FCC to allot its authorized and proposed NTSC operations additional channels for digital television (DTV) service.

We have made engineering studies to determine the equivalent effective radiated power for DTV service to replicate the Grade B service areas of some of the NTSC TV operations authorized or planned by KM Communications, Inc. The estimated power levels are shown on the attached Table I.

The approximate power levels were determined for the antenna height and site authorized or proposed and are based on the planning factors listed in the FCC's Sixth Further Notice of Proposed Rule Making. It is possible that the Commission may revise its planning factors after it reviews comments filed in this Docket. Any change in the planning factors could result in a change in the required DTV power. In addition, it is possible the very low DTV power levels allotted by the Commission in certain areas may not be sufficient to replicate the NTSC TV service area. Therefore, KM should reserve its rights to request higher DTV power levels, if necessary.

If there are any questions concerning this matter, please give us a call.

Sincerely,



S. K. Khanna

SKK:mow  
Enclosure

cc: Mrs. Myoung Hwa Bae

COHEN, DIPPELL AND EVERIST, P. C.

**TABLE I**  
**EQUIVALENT EFFECTIVE RADIATED POWER**  
**FOR DTV OPERATION TO REPLICATE**  
**NTSC GRADE B SERVICE**  
**NOVEMBER 1996**

<u>NTSC</u> <u>Channel</u>	<u>City/State</u>	Authorized or Proposed <u>ERP</u> kW	<u>HAAT</u> meters	<u>Coordinates</u>	<u>DTV Power</u>		
					<u>UHF</u>	<u>High</u> <u>VHF</u>	<u>Low</u> <u>VHF</u>
20	Iowa City, IA	5000	610	42-07-04 91-11-15	421	2.0	1.5
30	Shawnee, OK	794	230	35-18-18 97-05-20	25.7	1.0	1.0
58	Sierra Vista, AZ	2140*	81	31-33-59 110-13-57	76.5	1.0	1.0
9	Flagstaff, AZ	1.0*	594	35-14-26 111-35-48	50.0	1.0	1.0
14	Boise, ID	2570*	812	43-45-18 116-05-52	234	2.0	1.0

\*Directional Operation.

### CERTIFICATE OF SERVICE

I, Tracy L. Trynock, do hereby certify that on this 22nd day of November, 1996, I have served by hand delivery copies of the "Comments of KM Communications, Inc." upon the following:

Chairman Reed E. Hundt  
Office of the Chairman  
Federal Communications Commission  
1919 M Street, NW, Room 814  
Washington, D.C. 20554

Commissioner James H. Quello  
Office of Commissioner Quello  
Federal Communications Commission  
1919 M Street, NW, Room 802  
Washington, D.C. 20554

Commissioner Rachelle B. Chong  
Office of Commissioner Chong  
Federal Communications Commission  
1919 M Street, NW, Room 844  
Washington, D.C. 20554

Commissioner Susan Ness  
Office of Commissioner Ness  
Federal Communications Commission  
1919 M Street, NW, Room 832  
Washington, D.C. 20554

Richard M. Smith, Chief  
Office of Engineering and Technology  
Federal Communications Commission  
2000 M Street, NW, Room 480  
Washington, D.C. 20554

Roy J. Stewart, Chief  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, NW, Room 314  
Washington, D.C. 20554

Barbara A. Kreisman, Chief  
Video Services Division  
Federal Communications Commission  
1919 M Street, NW, Room 702  
Washington, D.C. 20554

Clay Pendarvis, Chief  
Television Branch  
Federal Communications Commission  
1919 M Street, NW, Room 702  
Washington, D.C. 20554



Tracy L. Trynock